Supreme Court, U.S.
FILED
APR 13 1995
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(2)

No. 94-1548

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LIBERTY SEAFOOD, INC.,

Petitioner,

v.

HERNDON MARINE PRODUCTS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 13, 1995

Washington, D.C. • THIEL PRESS • (202) 328-3286

10 pp

QUESTION PRESENTED FOR REVIEW

The issue before this Court is whether the Fifth Circuit Court of Appeals was correct in ruling that a shipowner may recover a percentage of its maintenance and cure payments from a negligent tort-feasor who had previously settled with the shipowner's injured seaman.

PARTIES TO THE PROCEEDINGS

Liberty Seafood, Inc., Petitioner, is represented herein by David Yancey White and Paul Dodson, of the law firm of White, Huseman, Plethcer & Powers, P.O. Box 2707, Corpus Christi, Texas 78403.

Herndon Marine Products, Inc., Respondent, is represented herein by George Michael Jamail, of the law firm of Bernsen, Jamail & Goodson, 595 Orleans, 4th Floor, P.O. Box 4915, Beaumont, Texas 77704-4915.

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CITATION OF OPINION OF THE UNITED STATES COURT OF APPEALS

The opinion rendered by the United States Court of Appeals for the Fifth Circuit, *Liberty Seafood, Inc. v. Herndon Marine Prods., Inc.*, 39 F.3d 755 (5th Cir. 1994), is the source of Petitioner's Writ of Certiorari.

JURISDICTION

This matter involves the general maritime law. The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Liberty Seafood, Inc., ("Liberty"), owner of the F/V GLORIA B, filed a complaint for exoneration from and/or limitation of liability pursuant to 46 U.S.C. §181 *et seq.* and Rule F, Fed. R. Civ. P., Supp. R. Adm. & Mar. Clms., for any claims arising out of a collision between the F/V GLORIA B and the F/V GULF KING 31, a shrimp boat owned and operated by Herndon Marine Products, Inc. ("Herndon"). The trial court ordered issuance of notice and enjoined the prosecution of any suits for any claims against the F/V GLORIA B or Liberty arising out of the collision except in the limitations proceeding.

All claimants (Herndon and the three crewmen of the F/V GULF KING 31) separately filed answers to the complaint in limitation and brought claims against Liberty and the F/V GLORIA B.

Shortly before trial of the limitations action, Liberty settled the negligence and unseaworthiness claims filed by the three Herndon crewmen. Liberty then filed a motion under Rule 12(b)(6), Fed. R. Civ. P., to dismiss Herndon's claims as barred by virtue of Liberty's settlements with the crewmen.

The trial court dismissed with prejudice the claims of the three crewmen. In the limitation proceeding, the court found Liberty (the F/V GLORIA B) 75% at fault

for the collision and Herndon (the F/V GULF KING 31) 25% at fault. The court also denied Liberty's claim for exoneration and/or limitation.

The trial court then granted Liberty's motion to dismiss Herndon's claim. Herndon timely filed notice of appeal of that order pursuant to 28 U.S.C. §1292(a)(3).

The United States Court of Appeals for the Fifth Circuit reversed the trial court's dismissal of Herndon's claims for reimbursement of maintenance and cure payments, and remanded the case to the district court for findings consistent with its opinion that Herndon can recover a portion of its maintenance and cure payments from Liberty.

STATEMENT OF FACTS

In the early afternoon hours of March 3, 1991, the F/V GLORIA B (Liberty) dragged anchor and drifted into the anchored F/V GULF KING 31 (Herndon). After striking the F/V GULF KING 31 (Herndon) twice, the F/V GLORIA B (Liberty) hurriedly left the area. The three Herndon crewmen – Don Gullick ("Gullick"), Frank E. Patton, Jr. ("Patton") and Michael Rodriguez ("Rodriguez") – all claimed personal injuries as a result of the collision. No injuries were reported on the Liberty vessel. As a result of the injuries sustained by the crew in the service of the F/V GULF KING 31, Herndon paid over $32,260 in maintenance and over $73,205 for cure to the three crewmen.

Liberty sought to limit its exposure for the negligence claims made against it by the Herndon vessel's seamen by filing an action for exoneration or limitation of liability. The three Herndon seamen answered the complaint and filed claims against Liberty and their employer,

Herndon, seeking to recover for personal injuries caused by Liberty's negligence and Herndon's negligence and unseaworthiness.

Herndon filed its own claim against Liberty and the F/V GLORIA B alleging that as a result of the collision caused by the Liberty vessel, Herndon was obligated to pay maintenance and cure payments to its injured crewmen. Herndon moved that the trial court approve its claim and award "damages in full", specifically stating a distinct claim for recovery of its maintenance and cure payments as follows:

> As a result of the Petitioner's negligence and/or the unseaworthiness of the Petitioner's vessel, Herndon Marine Products, Inc. was forced to pay maintenance and cure payments to its crew members allegedly injured in the collision for which it seeks *recovery, indemnity and contribution.* The Claimant was also forced to defend personal injury actions filed by the allegedly injured crewmen for which its (sic) seeks recovery, indemnity and contribution. Further, the claimant suffered physical damages to its vessel and loss of use of its vessel due to the collision for which it seeks recovery.
>
> . . .
>
> Further, the Claimant prays that it *recover the amounts it paid to its crew members for maintenance and cure benefits.* In addition, the Claimant requests recovery, contribution and indemnity for all amounts it may be forced to pay for personal injury lawsuits filed by its members. The Claimant also prays that it receive damages for the loss of use of its vessel and the physical damage to its vessel (emphasis added).

Shortly before the limitations action was tried, Liberty settled the personal injury claims of the three Herndon crewmen for a total of $59,000.[1]

SUMMARY OF HERNDON'S ARGUMENT

The holding of the Court of Appeals in reversing the decision of the District Court was correct in all respects.

A maritime employer has an independent cause of action to recover maintenance and cure payments from a third party whose negligence contributed to the seaman's injury. This cause of action is not derivative to that of the shipowner's injured seamen. The negligence of the third party results in damages peculiar to the shipowner in the form of its contractual obligation to pay maintenance and cure.

Settlement of a negligence claim by a seaman and a third party vessel does not bar a shipowner's right to recoup maintenance and cure benefits because the shipowner's recovery against the negligent vessel is for distinct damages occasioned to the shipowner by the third party's vessel.

STANDARD OF REVIEW

Herndon appealed the trial court's dismissal of its claim. The trial court dismissed this case pursuant to 12(b)(6), Federal Rules of Civil Procedure. The issues presented to the Fifth Circuit were subject to *de novo* review.

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[1] Liberty paid $45,000 to Gullick, $10,000 to Patton and $4,000 to Rodriguez in settlement of their negligence claims against Liberty.

ARGUMENT AND AUTHORITIES IN SUPPORT OF HERNDON'S POSITION

I.
THE NATURE OF A SHIPOWNER'S OBLIGATION TO PAY MAINTENANCE AND CURE

The right of a seaman injured in the service of a ship to recover unearned wages and maintenance and cure, without regard to the fault of the shipowner, is considered to be "among the most pervasive incidents of the responsibility anciently imposed upon a ship owner". *Aguilar v. Standard Oil Company*, 318 U.S. 724, 730 (1943).

A ship owner has an affirmative duty to pay maintenance and cure, irrespective of its own fault or the fault of others, and must pay the benefits promptly and until maximum cure is achieved or face a claim by the seaman for punitive damages. *See, Vaughan v. Atkinson*, 369 U.S. 527 (1962).

II.
THE RIGHT OF A SHIPOWNER TO RECOVER MAINTENANCE AND CURE

Since a shipowner is required to pay maintenance and cure without regard to fault, it is legally logical and equitable that a shipowner can maintain an action to recover its maintenance and cure payments against a negligent tort-feasor.

The Second, Third, and Fifth Circuits have recognized a shipowner's right to recover maintenance and cure payments from a negligent third party. *Black v. Red Star Towing and Transp. Co., Inc.*, 860 F.2d 30 (2nd Cir. 1988); *Jones v. Waterman Steamship Corp.*, 155 F.2d 992 (3rd Cir. 1946); *Tri-State Oil Tool Industries, Inc.*

v. Delta Marine Drilling Company, 410 F.2d 178 (5th Cir. 1969).

In addition, a shipowner has been allowed to recoup maintenance and cure payments from a negligent third party even when the employee was contributorily negligent. *Thibodeaux v. Texas Eastern Transmission Corp.*, 548 F.2d 581 (5th Cir. 1977). Further, the shipowner's right to reimbursement for maintenance and cure payments is not defeated even if its own negligence contributed to the seaman's injury. *Adams v. Texaco, Inc.*, 640 F.2d 618 (5th Cir. Unit A 1981). In this case, the Fifth Circuit noted that the underlying rationale granting the shipowner indemnity in such matters is that the burden of maintenance and cure should not fall solely on the shipowner. *Id.*, 640 F.2d at 621.

A shipowner's right to recovery despite the seaman's "relinquishment" of his rights against the third party has also been affirmed. *Savoie v. Lafourche Boat Rentals, Inc.*, 627 F.2d 722 (5th Cir. Unit A 1980). Herndon's right to recover maintenance and cure benefits from Liberty is not precluded by the court's assessment against if of twenty-five percent (25%) of the fault in causing the collision. The sole argument set forth by Liberty concerning Herndon's claim for partial reimbursement is that it is defeated by virtue of Liberty's settlement with the crewmen – the Settlement Bar Rule.

III. THE SETTLEMENT BAR RULE IS INAPPLICABLE TO A SHIPOWNER'S ACTION TO RECOVER MAINTENANCE AND CURE

The court in *Jones v. Waterman Steamship Corp.*, 155 F.2d 992 (3d Cir. 1946), also addressed whether a seaman's release of a negligent tort-feasor would affect the shipowner's right of recovery. In this connection, the seaman's settlement with and release of the third party did not protect the third party from the employer's right to recover. Specifically, the shipowner's right to recovery from the tort-feasor was in no way derivative from the seaman's tort claim, and thus could not be affected by the release. *Id.*, at 1001.

The Fifth Circuit has also rejected the proposition that the "settlor bar" rules apply with respect to reimbursement of maintenance and cure payments.

Liberty relies on the holding in *Associated Electric Co-op. v. Mid American Transp.*, 931 F.2d 1266 (8th Cir. 1991). Liberty asserts that *Associated Electric* precludes Herndon's action from recovery of maintenance and cure payments as a matter of law. In *Associated Electric,* the court denied the employer's right to recover maintenance and cure from a negligent third party as a claim for contribution barred by the "proportional fault" approach referred to by the Restatement (Second) of Torts, comment m(3) and adopted in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979). In addressing this matter, the Fifth Circuit was correct in finding that the *Associated Electric* court missed the critical distinction between an employer's right to recover maintenance and cure payments, and one tort-feasor's right to recover some or all of a damage award assessed against it from another tort-feasor. *Bertram v. Freeport Moran, Inc.*, 35

F.3d 1008 (5th Cir. 1994). Thus, an employer's right to reimbursement of maintenance and cure is an independent cause of action rather than a claim for contribution. *See, Pacific Steamship Co. v. Peterson,* 278 U.S. 130 (1928); *Jones v. Waterman Steamship Corp.,* 155 F.2d 992 (3rd Cir. 1946).

The reason the Settlement Bar Rule is inapplicable to the instant case is that maintenance and cure benefits constitute a unique compensation system for injured seamen. The Settlement Bar Rule is intended to prevent a party from being obligated to pay an element(s) of damage for which it has already settled. Liberty and Herndon were mutually subject to general maritime damage claims by the Herndon crewmen. The mutually applicable damage elements were for economic loss and pain and suffering. Herndon's claim against Liberty does not seek recovery of any element of damage for which Liberty has previously paid to the Herndon crew members. To the extent that Herndon is seeking damages from Liberty which were not in any way a part of Liberty's settlement with the Herndon crew members, Herndon's claim is maintainable and the Fifth Circuit's ruling is correct.

If, in fact, Herndon's claim sought recovery from Liberty for any monies that Herndon paid to its seamen employees for negligence or unseaworthiness, then the Settlement Bar Rule would apply and Herndon's claim would be barred because Liberty's settlement with the Herndon employees encompassed these damages (*McDermott, Inc. v. AmClyde,* 114 S.Ct. 1461 (1994)); however, that is not the issue presented in the instant case.

Liberty incorrectly urges that this is the issue presented by the instant case, and continues to mischaracterize Herndon's claim as one for indemnity in the tra-

ditional sense when, in fact, Herndon's claim seeks only to recover the damages which it, in its capacity as a maritime employer, has peculiarly sustained under its maintenance and cure obligation.

CONCLUSION

A seaman's right to recover maintenance and cure from his employer and his right to recover compensatory damages from negligent parties (either his employer or third parties) are separate and distinct causes of action. Because of the employer's unique obligation to pay, its right to reimbursement of maintenance and cure is unaffected by the seaman's settlement with a negligent third party.

Here, the negligence of the third party, Liberty, caused harm to two parties. Liberty's tort against the crew resulted in damages which could be the subject of a claim for personal injuries. Liberty's tort harmed Herndon by triggering its contractual obligation to pay maintenance and cure.

Herndon has an independent right to be reimbursed for the portion of maintenance and cure attributable to Liberty's negligence.

If Liberty was allowed to preclude Herndon's right to partial reimbursement merely by settling the seaman's personal injury claim, Liberty would in effect escape its liability to Herndon occasioned by its tort.

Herndon requests that this Court deny Petitioner's Writ of Certiorari and affirm the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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